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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DASHAN DAY ARMSTRONG, Defendant and Appellant.	E046281 (Super.Ct.Nos. RIF124980, RIF138990 & RIF129523) OPINION

APPEAL from the Superior Court of Riverside County. Curtis R. Hinman, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Raquel M. Gonzalez, and Lilia E. Garcia, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Dashan Day Armstrong appeals from judgments entered following jury

convictions in Riverside Superior Court case No. RIF 124980, consolidated for purposes of appeal with case Nos. RIF 129523 and RIF 138990. In case No. RIF 124980, the jury found defendant guilty of making criminal threats (Pen. Code, § 422[1]; count 1) and battery upon a spouse (§ 243, subd. (e); count 4). The jury found defendant not guilty of being a felon in possession of a firearm (§ 12021, subd. (c)(1); count 2) and exhibiting a firearm (§ 417, subd. (a)(2); count 3).

Defendant was sentenced to a total prison term of five years eight months in case No. RIF 129523 and a consecutive term in case No. RIF 124980, of eight months in prison.

Defendant contends there was insufficient evidence in case No. RIF 124980 that he threatened a specific person or that the purported victim experienced fear. Defendant also contends this court should independently review a sealed transcript and documents reviewed by the trial court during an in camera hearing on defendant's *Pitchess*[2] motion.

Since there is no record on appeal of what documents were reviewed by the trial court, this court ordered augmentation of the record. Thereafter we reviewed the information and records provided, as well as the sealed transcript of the in camera *Pitchess* motion hearing. We conclude the trial court followed the proper procedures when conducting the *Pitchess* motion hearing and it did not abuse its discretion in ruling none of the records or information was discoverable, other than the name and address of

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[1] Unless otherwise noted, all statutory references are to the Penal Code.

[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

one complainant. We further conclude there was sufficient evidence to support defendant's conviction for making criminal threats. Accordingly, we affirm the judgment.

1. Facts

For purposes of appeal, defendant's three criminal cases have been consolidated (Riverside Superior Court case Nos. RIF 129523, RIF 138990, and RIF 124980). The instant appeal only concerns issues raised in case No. RIF 124980, which involves a domestic violence incident. The other two cases concern felony drug offenses for possession and sale of methamphetamine and cocaine. The facts in case Nos. RIF 138990 and RIF 129523 are not relevant to this appeal and therefore will not be summarized. The following is a summary of the facts in case No. RIF 124980.

During the afternoon of February 25, 2005, defendant and, Barbara Robertson, who lived together, got into an argument over a cell phone. Defendant believed Robertson had taken his cell phone and he wanted it back. Robertson denied taking it. When she attempted to leave their apartment, defendant blocked the front door. Robertson pushed him away and left with their three-year-old son.

Robertson and her son went to her mother's apartment. While there, defendant called Robertson several times and asked for his phone. An hour or two later, defendant arrived at the apartment. Defendant and Robertson resumed arguing over the cell phone.

Sheriff's Deputy Adams testified that at 3:45 p.m., she responded to Robertson's 911 call. Upon arriving at Robertson's mother's apartment, Adams spoke to Robertson, who appeared upset and was crying. Robertson told Adams that she and defendant had

gotten into an argument around 2:00 p.m. that day over a cell phone. Because of the argument, Robertson left their residence and went to her mother's home. While there, defendant called her and continued accusing Robertson of taking his phone.

Robertson told Adams that around 3:15 p.m., defendant entered through the front door with a revolver in his hand, yelling angrily, "I'm going to shoot this motherfucker up." Defendant grabbed Robertson, pushed her against the refrigerator, and put his hand around her neck, squeezing it. She had difficulty breathing and could not get defendant off her. Robertson's mother intervened and pulled defendant off Robertson.

Defendant continued making threats and waving his gun in the air. Robertson told defendant to leave. Defendant took Robertson's cell phone out of her purse and left when Robertson began dialing 911 on her mother's phone.

While Adams was interviewing Robertson, defendant called. Adams overheard the conversation and asked Robertson to confront defendant about threatening her with a gun. When Robertson asked defendant on the phone why he brought a gun over, defendant denied bringing a gun. A gun was never recovered.

Deputy Adams testified that she also spoke to Robertson's stepfather, Jerry Flowers that day, at the crime scene. He was upset about the incident. He told Adams that at the time of the incident, he was in the living room and saw defendant enter, waving a gun and saying, "I'm going to shoot this motherfucka up." Flowers said he believed defendant's threat. Flowers also told Adams he saw defendant grab Robertson by the neck, push her up against the refrigerator, and threaten to shoot up the apartment.

Flowers saw Robertson's mother pull defendant off Robertson. Then Flowers grabbed defendant and removed him from the house.

Adams did not observe any injuries to Robertson's neck.

Robertson's mother passed away prior to the trial.

At trial, Robertson recanted and testified that she and defendant did not fight over the cell phone. She acknowledged defendant came over to her mother's home but Robertson said she did not know why. When he arrived, she was on the front porch. He asked her if she had his cell phone and she told him she did not have it. They went inside, still arguing over the phone. He told her, "I know you got my fucking, you know, cellular phone." They argued about the phone for a while and then he grabbed her by the arm and pushed her against the refrigerator. She slapped him in his face. Eventually he let go of Robertson. Robertson's mother grabbed defendant and talked to him in the bedroom while Robertson remained in the living room.

After defendant and Robertson's mother finished talking, defendant continued to ask Robertson for his phone. Robertson's stepfather, Flowers, told defendant to leave because someone had called the police and had accused defendant of waving a gun. Defendant said he did not have a gun and left.

Robertson testified that the police came and she told them she and defendant had been arguing over a cell phone but it was just a little argument, "all over nothing." Robertson testified she was not afraid of defendant at the time of the incident, and at the time of her testimony, she said she loved him very much. She is still with him.

Robertson denied that defendant had a revolver in his hand at her mother's home and denied nearly everything Adams testified Robertson had told her, including telling Adams that when defendant arrived, he was waving a gun, yelling, "I'm going to shoot this motherfucka up."

At trial, Flowers also recanted. He denied telling an officer that when defendant arrived, he was waving a gun and saying, "I'm going to shoot this motherfucker up."

Robertson obtained a temporary restraining order (TRO) against defendant in February 2006, a year after the incident.

2. Sufficiency of Evidence

Defendant contends there was insufficient evidence supporting his conviction for making criminal threats (§ 422; count 1). We disagree.

Upon a challenge to the sufficiency of the evidence, we examine the whole record in the light most favorable to the judgment below and determine whether or not the record discloses substantial evidence upon which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) "In making this determination, we '"must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."'" (*People v. Rayford* (1994) 9 Cal.4th 1, 23.)

Section 422 defines the elements of a criminal threat: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally . . . , is to be taken as a

threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

In deciding whether substantial evidence exists, the court considers all the surrounding circumstances, including defendant's history with the victim: "the determination whether a defendant intended his words to be taken as a threat, and whether the words were sufficiently unequivocal, unconditional, immediate and specific they conveyed to the victim an immediacy of purpose and immediate prospect of execution of the threat can be based on all the surrounding circumstances and not just on the words alone. The parties' history can also be considered as one of the relevant circumstances." (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340 (*Mendoza*).)

Furthermore, section 422 ". . . does not concentrate on the precise words of the threat but whether the threat communicated a gravity of purpose and immediate prospect of execution of the threat[]." (*Mendoza, supra*, 59 Cal.App.4th at pp. 1340-1341, citing *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1159.) In determining whether there has been a criminal threat, the jury can properly consider a later action taken by a defendant. (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1014.) The fact that the verbal threat was

vague or ambiguous is not dispositive. All of the circumstances can and should be considered in determining whether a terrorist threat has been made. (*Ibid.*)

In the instant case, defendant's conviction for violating section 422 was based on defendant entering Robertson's mother's apartment, yelling "I'm going to shoot this motherfucker up," waving a gun, and then grabbing Robertson, pushing her up against the refrigerator, and squeezing her neck, while continuing to yell threats. Defendant argues there was insufficient evidence he made a threat against a specific person, as required by the statute. He also asserts that Robertson was not placed in fear from defendant's alleged statement that "I'm going to shoot this motherfucker up."

Evidence that defendant made this statement and the surrounding circumstances, was more than sufficient to support defendant's conviction for making criminal threats. Such evidence included Deputy Adams's testimony that Robertson told her right after the incident that earlier in the afternoon defendant had angrily and persistently accused Robertson of taking his phone, and Robertson had adamantly denied doing so. The argument became so contentious that she left her home with her young son and went to her mother's home. Defendant called numerous times at her mother's home, demanding that Robertson return his phone. Defendant was furious with Robertson when he confronted her at her mother's home. It can be reasonably inferred defendant intended to force Robertson to return his phone. In addition, Adams testified Robertson told her that, as defendant entered the apartment, he yelled, while waving a gun, "I'm going to shoot this motherfucker up," and then grabbed Robertson, pushed her against the refrigerator,

squeezed her neck, and continued to yell threats until Robertson's mother intervened and pulled defendant away from Robertson.

The evidence showed that defendant was so enraged at Robertson and intent on retrieving his phone from her that, in the process of attempting to get his phone back from her, he threatened her. The evidence was thus more than sufficient to establish that defendant made criminal threats against a specific person, Robertson.

Defendant's argument that Robertson did not experience fear as a result of the threat also lacks merit. The circumstances, alone, were sufficient to support a reasonable finding that Robertson experienced "sustained fear for his or her own safety or for his or her immediate family's safety." (§ 422.) According to Adams's testimony, Robertson told her defendant was angrily yelling and waving a gun, while threatening to fire his gun and then grabbed her and squeezed her neck, causing her to have difficulty breathing. Defendant's rage was clearly directed toward Robertson and therefore the jury could reasonably find that, when defendant threatened to "shoot this motherfucker up," he was referring to Robertson, and Robertson feared defendant would shoot her or seriously harm her in some way.

A finding of such fear was also supported by Adams's testimony that Flowers, who witnessed the incident, told her that when defendant said he was going to "shoot this motherfucka up," Flowers believed defendant's threat and thought defendant was going to "shoot the place up."

In addition, Robertson testified that prior to the incident, defendant had told her he had been in custody for committing robbery with a friend, during which the victim was

shot to death, and defendant had a tattoo that said, "100 percent 187," the Penal Code section for murder. Robertson also acknowledged that about a year after the incident, she obtained a TRO because defendant was stalking her and had grabbed and physically hurt her while she was pregnant and while she was holding their baby.

Such evidence amply supports a reasonable finding that Robertson feared defendant would carry out his threats and seriously harm her.

3. Defendant's *Pitchess* Motion

Defendant requests this court to review independently the sealed transcript of a *Pitchess* motion and also review the documents produced during the hearing to determine whether the trial court properly followed appropriate *Pitchess* hearing procedures and abused its discretion in ruling on defendant's *Pitchess* motion.

A criminal defendant has a limited right to discovery of peace officer personnel records based on the fundamental proposition that a defendant is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information. (*City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1141.) An accused may compel discovery by demonstrating that the requested information will facilitate the ascertainment of facts and a fair trial. (*Ibid.*)

In order to obtain discovery of the personnel records of a peace officer, the moving party must submit affidavits showing good cause for such discovery and setting out the materiality of the information requested. (Evid. Code, § 1043, subd. (b).) Under *Pitchess*, a defendant demonstrates good cause for discovery when the defendant shows the information requested is (1) relevant to a defense of self-defense, (2) necessary in that

defendant could not readily obtain the information through his own efforts, and (3) described with adequate specificity to preclude the possibility that the defendant was engaging in a fishing expedition. (*Pitchess v. Superior Court, supra,* 11 Cal.3d at pp. 537-538.) Evidence Code section 1045 provides that if production is warranted, the trial court must examine the personnel files in camera to determine whether they contain any relevant information.

In August 2007, defendant filed a motion for discovery of information in police files and records (*Pitchess* motion). Defendant requested the trial court order the sheriff's department to produce records relating to Deputy Adams, including any evidence of complaints of excessive force, aggressive conduct, unnecessary violence, unnecessary force, racist remarks, false arrest, false statements in reports, false claims of probable cause, or any other evidence of complaints or dishonesty by Adams. Defendant argued that the records were necessary to the effective preparation of his defense and might be useful in impeaching witnesses, particularly Adams, the prosecution's key witness.

The supporting declaration of defense counsel stated he believed Adams did not accurately report Robertson's and her mother's statements, i.e., that they told Adams defendant had brandished a firearm and threatened Robertson with the firearm. Counsel believed Adam's was lying because, during a subsequent interview, Robertson and her mother denied making such statements, and Adams overheard defendant on the telephone denying the accusations. Nevertheless, Adams included the information in her report, knowing it was false. Defense counsel also stated in her declaration that she believed Adams was placed on administrative leave for misconduct and possible fabrication of

evidence and reports, and that Adams's personnel file contained complaints of fabricated evidence and falsification of reports.

Adam's veracity and credibility as a witness was a key issue in the trial since she was the only witness who testified that, according to Robertson and Flowers, defendant had said, "I'm going to shoot this motherfucker up", and both Robertson and Flowers recanted at trial.

The sheriff's department objected to production of Adams's personnel records. On September 28, 2007, the trial conducted an in camera review of the records, out of the presence of the parties and their attorneys. Counsel for the Riverside County Sheriff's Department and the custodian of records appeared at the in camera records review hearing. The trial court reviewed the personnel records produced by the sheriff's department and concluded there were no discoverable records. The court, however, permitted the dissemination to defense counsel of a complainant's name and address for purposes of allowing investigation of an apparent unfounded complaint.

Because defendant was not present at the records review hearing, he requests this court conduct an independent review of the sealed transcript of the hearing and also review the records produced to determine whether any error occurred. The People do not oppose this request. The People assert that upon doing so, this court will conclude there was no impropriety in the manner in which the court conducted the *Pitchess* review hearing or any abuse of discretion in the trial court's findings.

As requested, we have reviewed the sealed transcript and conclude the trial court properly conducted a *Pitchess* document review hearing. The records produced during

the in camera hearing, however, were not included as part of the record on appeal. Although the sealed transcript refers to the documents reviewed and the trial court explains why various documents do not fall within *Pitchess*, the reviewed documents are not sufficiently identified and described for this court to determine whether the produced documents were discoverable.

Because the record does not include copies of the documents produced or sufficiently describe each document, under *People v. Mooc* (2001) 26 Cal.4th 1216 (*Mooc*), we ordered augmentation of the record for the purpose of creating a record from which this court could determine whether the documents reviewed by the trial court are discoverable. (*Id.* at p. 1231.)

In *Mooc, supra*, 26 Cal.4th 1216, as here, the trial court examined the records provided by the custodian of the requested records and declined to order disclosure. The court of appeal found the appellate record did not contain the records the trial court had examined, so it directed the police department to submit such records directly to the appellate court. Believing the police department and city attorney had improperly censored the files given to the trial court, the court of appeal ordered the custodian of the records to deliver directly to the appellate court the entire personnel file of the officer in question. After examining the entire file, the appellate court concluded that discoverable records had not been given the trial court, thus preventing the trial court from exercising its discretion under *Pitchess.* Accordingly, it reversed the defendant's conviction and remanded with directions that the trial court conduct a new *Pitchess* hearing and, if the

hearing revealed discoverable information, the trial court was to disclose such before retrying the case. (*Mooc, supra,* at pp. 1222-1225.)

The Supreme Court in *Mooc, supra,* 26 Cal.4th 1216, concluded that the court of appeal erred in directing the custodian to turn over the officer's complete personnel file directly to the appellate court. (*Id.* at pp. 1230-1231.) The appropriate remedy, was to remand the case to the trial court with directions to augment the record to reflect the documents it reviewed. (*Id.* at p. 1231.) The *Mooc* court stated that the uncertainty in the record "justified remanding the case to the trial court with directions to hold a hearing to augment the record with the evidence the trial court had considered in chambers when it ruled on the *Pitchess* motion." (*Mooc, supra,* 26 Cal.4th at p. 1231.) However, in *Mooc,* the Supreme Court ultimately concluded that the additional delay inherent in causing the matter to be remanded to the trial court to settle the record as to what it had reviewed seemed "imprudent, if unnecessary." Accordingly, the Supreme Court simply reviewed the personnel file itself and concluded it contained nothing disclosable. (*Id.* at p. 1232.)

In *Mooc*, the court described the proper procedures to be followed by the trial court when, as in this case, the trial court concludes that good cause exists for the trial court to review an officer's personnel file in response to a *Pitchess* motion: "When a trial court concludes a defendant's *Pitchess* motion shows good cause for discovery of relevant evidence contained in a law enforcement officer's personnel files, the custodian of the records is obligated to bring to the trial court all 'potentially relevant' documents to permit the trial court to examine them for itself. [Citation.] A law enforcement officer's personnel record will commonly contain many documents that would, in the normal case,

be irrelevant to a *Pitchess* motion, including those describing marital status and identifying family members, employment applications, letters of recommendation, promotion records, and health records. (See Pen. Code, § 832.8.) Documents clearly irrelevant to a defendant's *Pitchess* request need not be presented to the trial court for in camera review. But if the custodian has any doubt whether a particular document is relevant, he or she should present it to the trial court. Such practice is consistent with the premise of Evidence Code sections 1043 and 1045 that the locus of decisionmaking is to be the trial court, not the prosecution or the custodian of records. The custodian should be prepared to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion. A court reporter should be present to document the custodian's statements, as well as any questions the trial court may wish to ask the custodian regarding the completeness of the record. [Citation.]" (*Mooc* at pp. 1228-1229.) The sealed reporter's transcript shows that these procedures were followed in the instant case.

The *Mooc* court further stated that during the *Pitchess* motion hearing, "The trial court should then make a record of what documents it examined before ruling on the *Pitchess* motion. Such a record will permit future appellate review. If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential file. Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined. Without some record of the documents examined by the trial court, a party's ability to obtain appellate

review of the trial court's decision, whether to disclose or not to disclose, would be nonexistent. Of course, to protect the officer's privacy, the examination of documents and questioning of the custodian should be done in camera in accordance with the requirements of Evidence Code section 915, and the transcript of the in camera hearing and all copies of the documents should be sealed.[] (See *People v. Samayoa* (1997) 15 Cal.4th 795, 825 [after ruling on the *Pitchess* motion, '[t]he magistrate ordered that all remaining materials be copied and sealed'].)" (*Mooc, supra,* 26 Cal.4th at pp. 1229-1230.)

Here, defendant has demonstrated the materiality of the information requested in his *Pitchess* motion. Adams's credibility as the sole witness supporting the prosecution's case, was critical and any complaints in her personnel file impugning her honesty are material to defendant's defense. "An accused is entitled to any '"'pretrial knowledge of any unprivileged evidence, or information that might lead to the discovery of evidence, *if it appears reasonable that such knowledge will assist him in preparing his defense*. . . .'"' [Citation, original italics.]" (*People v. Gill* (1997) 60 Cal.App.4th 743, 750.)

Both parties in this case agree that review by this court of the records reviewed by the trial court in camera is appropriate. Due to this court's inability to determine what records were produced or whether the trial court appropriately denied disclosure of the records, this court ordered augmentation of the record to enable this court to review those records produced in the trial court in camera and determine whether the trial court abused its discretion in not ordering production of any of the records or information, other than the name and address of one complainant.

Based on our review of the sealed reporter's transcript of the in camera *Pitchess* motion proceeding and the sealed augmented record of the documents reviewed during the trial court hearing, we conclude the trial court properly exercised its discretion in excluding from disclosure Adams's personnel records. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827.)

4. Disposition

The judgment is affirmed.

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s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/King
J.